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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHRYSLER PLASTIC PRODUCTS CORPORATION,

PETITIONER,

v.

FEDERICO EREBIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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26 pp

QUESTIONS PRESENTED

1. Where racial slurs uttered by a subordinate to a supervisor in a union shop have been reported to management which has instructed that supervisor to build a case for disciplinary action and the supervisor has not performed that instruction, can the employer be liable to the supervisor on that basis for discrimination violating 42 U.S.C. §1981 and for punitive damages thereunder?

2. When the forum state common law rule precludes punitive damages without proof of actual injury, can the court of appeals reverse an award of compensatory damages for failure to prove actual injury without also reversing the punitive damage award and thus ignore 42 U.S.C. §1988?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 14

CONCLUSION 40

APPENDIX .....ia

A. Opinion Below 1a

B. Judgment of the United States District Court for the Northern District of Ohio, Western Division, Hon. John W. Potter, January 12, 1984, in favor of plaintiff on plaintiff's §1981 racial slurs claim.....54a

TABLE OF CONTENTS (Cont'd.)

C. Memorandum and Order of the United States District Court For the Northern District of Ohio, Western Division, Hon. John W. Potter, March 9, 1984, denying Defendant's Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for a New Trial.....55a

D. Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, Western Division, Hon. John W. Potter, March 9, 1984, pertaining to dismissal of plaintiff's Title VII claims.....59a

E. Supplemental Judgment of the United States District Court for the Northern District of Ohio, Western Division, Hon. John W. Potter, April 4, 1984, in favor of defendant on plaintiff's Title VII claims.....70a

TABLE OF CONTENTS (Cont'd.)

F. Order of the United States Court of Appeals for the Sixth Circuit, September 19, 1985 denying petition for rehearing en banc.....71a

G. List of Corporate Petitioner's Parent Companies, Subsidiaries and Affiliates, Pursuant to Supreme Court Rule 28.1 .....73a

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Methodist Envangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972)	20
Basista v. Weir, 340 F.2d 74 (3d Cir. 1965)	27,34,35
Behmyer v. Milgram Food Stores, Inc., 151 Kansas 921, 101 P.2d 912 (1932)	36
Bishop v. Grdina, 20 Ohio St. 3d 26 (1985)	36
Burnett v. Grattan, 52 U.S.L.W. 4916 (1984)	31-32
Calcote v. Texas Educational Foundation, Inc., 578 F.2d 95 (5th Cir. 1978)	20
Carey v. Piphus, 435 U.S. 247 (1978)	24,29-30, 37,38
Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974)	34
General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982)	15
Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983)	19-20
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	25

TABLE OF AUTHORITIES (Cont'd.)

	Page
Long v. Ford Motor Company, 496 F.2d 500 (6th Cir. 1974)	18
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	18
Mitchell v. Keith, 752 F.2d 393 (9th Cir. 1985), cert. denied 53 U.S.L.W. 3895 (1985).	19,21, 34
Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981)	24
Richard v. Hunter, 151 Ohio St. 185 (1949).	36
Robertson v. Wegmann, 436 U.S. 584 (1977).	28-30, 38
Rodgers v. Fisher Body Division, General Motors Corp., 739 F.2d 1102 (6th Cir. 1984), cert. denied, 52 U.S.L.W. 3669 (1985) . . .	26-27
Seasons Coal Co., Inc. v. City of Cleveland, 18 Ohio St. 3d 77 (1984) .	36
Silver v. Cormier, 529 F.2d 926 (10th Cir. 1976).	34
Smith v. Wade, 103 S.Ct. 1625 (1983).	24,30-32,37, 39

TABLE OF AUTHORITIES (Cont'd)

	Page
Stolberg v. Members of Board of Trustees for State College of Connecticut, 474 F.2d 485 (2d Cir. 1973)	34
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)	28
Underwriters Laboratories, Inc. v. Smith, 246 N.Y.S.2d 436 (N.Y. Ct. App. 1934)	35
Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), reh'g denied, 760 F.2d 1330 (D.C. Cir. 1985), cert. granted sub nom., PSFS Savings Bank FSB v. Vinson, 54 U.S.L.W. 3223 (1985) (No. 84-1979, 1985 Term)	14-16, 18,21, 22
Wilson v. Garcia, 53 U.S.L.W. 4481 (1985)	32-33, 37
Young v. Southwestern Savings. & Loan Association, 509 F.2d 140 (5th Cir. 1975)	20
Statutes:	
28 U.S.C. §1254(1)	2

TABLE OF AUTHORITIES (Cont'd)

	Page
42 U.S.C. §1981	2-4, 6,9,12 14,15, 18,20-25, 34,38,39
42 U.S.C. §1983	24,27, 29-34
42 U.S.C. §1988	2,4, 23,25, 28-32, 38-39
42 U.S.C. §2000 e-2, et seq., Title VII of the Civil Rights Act of 1964	6,9, 14,15, 20
Law Review Articles:	
97 Harv. L. Rev. 1449, Note, Sexual Harassment Claims of Abusive Work Environment under Title VII (1984). .	18
Treatises:	
C. McCormick, Handbook on the Law of Damages (1935).	35
Annotations:	
Annot., 40 A.L.R. 4th 11 (1985) . . .	35,36

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CHRYSLER PLASTIC PRODUCTS CORPORATION,

PETITIONER,

v.

FEDERICO EREBIA

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Chrysler Plastic Products Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the case of Federico Erebia v. Chrysler Plastic Products Corporation, No. 84-3291, on June 7, 1985.

OPINIONS BELOW

The opinion of the court of appeals is reported at 772 F.2d 1250 (6th Cir. 1985) and is reprinted in the appendix to this petition at 1a-53a, which is incorporated by reference herein.

JURISDICTION

The opinion and judgment of the court of appeals was entered on June 7, 1985. A timely petition for rehearing en banc was denied by order of the court of appeals entered on September 19, 1985. The jurisdiction of this Court is invoked pursuant to to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves two sections of the Reconstruction Era Civil Rights Acts, 42 U.S.C. §§1981 and 1988.

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (42 U.S.C. §1981).

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted in the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,

> so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VII of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> (42 U.S.C. §1988).

STATEMENT OF THE CASE

Two rank and file employees in a union shop directed racial epithets at their supervisor. This case involves the employer's liability to the supervisor under 42 U.S.C. §1981 and the availability of punitive damages as a result of the employees' name-calling. It is particularly distinguished because the sixth circuit

reversed the jury's compensatory damages award for the supervisor's failure to prove any actual injury, but nevertheless upheld the jury's substantial punitive damages award. In so doing, the sixth circuit's action conflicted with the district court's unappealed jury instruction.

Respondent Federico Erebia (hereinafter "Mr. Erebia"), a Mexican-American citizen, was hired by petitioner Chrysler Plastic Products Corporation (hereinafter "Chrysler") in 1965 at its Sandusky, Ohio plant. In 1969 Chrysler promoted Mr. Erebia to the management position of supervisor, a position he held at all times material to this case.

Mr. Erebia filed his complaint in the United States District Court for the Northern District of Ohio, Western Division, in February, 1983. His claim of racial slurs against him by two Chrysler

employees under his supervision was only one of four claims originally brought in the complaint. Mr. Erebia's other claims related to alleged intentional discrimination in connection with shift changes, and layoffs and recalls during the recent economic recession in the automobile industry. These claims were raised under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2 et seq. and 42 U.S.C. §1981. The Title VII claims were tried to the district court simultaneously with trial of the 42 U.S.C. §1981 claims to a jury.

The bulk of Mr. Erebia's testimony concerned his shift change, layoff and recall claims. Mr. Erebia's testimony on direct examination pertaining to his racial slurs claim was minimal. He identified only two Chrysler hourly employees under his supervision with whom he had problems

over the six year period in issue, and these two employees were in two different departments at two different times. Mr. Erebia testified that one of his subordinates, Rolland Forney, called him a "wet bag [back]" and "tomato picker" and that Forney refused to follow Mr. Erebia's instructions "on a daily basis" from 1977 until 1980, when Mr. Forney was laid off. Mr. Erebia also testified that a second individual, Wilbur Wood, told him to "go back to Mexico, there was some white person that could be doing my job instead of a Mexican." At this time, Mr. Erebia was a supervisor in a different department from the one to which Mr. Forney was assigned. Mr. Erebia testified that Mr. Wood failed to follow his instructions for a period covering April through August of 1980.

Mr. Erebia testified that he complained about these racial slurs to his production superintendent, his general foreman, and the plant personnel manager. He also testified that he complained to the production superintendant daily, but that he only spoke twice with Mr. Lenz, the plant personnel manager, concerning subordinates' slurs. Mr. Erebia did not address his complaints, however, to Chester Ferguson, the labor relations and hourly employment supervisor at the Chrysler Sandusky plant. Mr. Ferguson's duties include responsibility for all employee disciplinary matters.

In response to these complaints, Mr. Erebia's immediate supervisor repeatedly told him to "build a case" against the subordinates for disciplinary purposes. The personnel manager, Mr. Lenz, told Mr. Erebia that he should be able to withstand

such slurs on one occasion and dismissed the name-calling as shoptalk on another occasion. On the second of these two occasions, in the summer of 1977, Mr. Lenz told Mr. Erebia he would "hurt him economically."

At trial Chrysler moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on the §1981 claims and for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the Title VII claims. The district court granted the motions and dismissed all but Mr. Erebia's §1981 claim of a racially abusive working environment as a result of racial epithets uttered by his two subordinates.

The district court thus instructed the jury concerning only the §1981 racial slurs claim and the separate availability of compensatory, nominal and punitive damages.

The jury was instructed that it could award punitive damages only if Mr. Erebia was entitled to compensatory damages and if the act or omission which caused injury to Mr. Erebia was done maliciously, wantonly or oppressively. The jury returned a verdict for Mr. Erebia, awarding him $10,000 in compensatory damages and $30,000 in punitive damages.

After trial, Chrysler moved for judgment notwithstanding the verdict and a new trial pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure. The district court denied the motions and entered judgment on the jury verdict. Chrysler appealed the judgment to the sixth circuit on April 6, 1984.

Chrysler argued the following issues to the sixth circuit: (1) insufficient evidence upon which a claim for racial

harassment of a supervisor by subordinates could be sustained; (2) the trial court's failure to include an element in the jury instructions pertaining to Mr. Erebia's own racial slurs against others; (3) the absence of evidence of any actual injury suffered by Mr. Erebia and the excessiveness of the compensatory damages award; (4) the inappropriateness of allowing the jury to consider punitive damages in the absence of any evidence of malice; and (5) the excessiveness of the jury's punitive damages award in light of both the absence of proof of actual injury and the insufficient evidence of malice in the record.

On June 7, 1985, over the strong dissent of Judge Kennedy, the sixth circuit affirmed the trial court judgment in part and reversed the trial court judgment in part. The majority decision rejected Chrysler's arguments and affirmed the

verdict on the issues addressing the substance of Mr. Erebia's §1981 racial slurs claim. The sixth circuit reversed the award of compensatory damages and returned the case to the trial court for entry of an award of $1 for what were described as "nominal compensatory damages." Nevertheless, the sixth circuit affirmed the punitive damages award.

The majority focused upon the apparent failure of Chrysler's management to take adequate steps to remedy the name-calling about which Mr. Erebia complained. Contrary to the majority's view, however, Chrysler did respond to Mr. Erebia's complaints of harassment. His supervisor repeatedly told him to "build a case"; this is the only basis in a union shop upon which disciplinary action against a rank and file employee could ever be sustained.

This adequate response by Chrysler management to a fellow manager's complaints about an employee's insubordination is virtually ignored and only briefly mentioned in the majority opinion. Appendix at 6a. Judge Kennedy, however, quickly grasped the real significance of Chrysler management's response:

> Erebia's immediate supervisor repeatedly told him to 'build a case.' Specific times, places, and witnesses would be needed to discharge or suspend a union employee. There is no evidence that Erebia, an experienced foreman, did build his case.
>
> (Appendix at 51a).

On June 21, 1985 Chrysler timely filed a petition for rehearing en banc. Chrysler argued that the essence of this case lies in a supervisor being subjected to racial slurs by a subordinate and the realities of response to such a situation in a union shop. Mr. Erebia's status as a supervisor

placed him in a position to control the situation himself. The sixth circuit denied Chrysler's petition for rehearing en banc on September 19, 1985.

REASONS FOR GRANTING THE WRIT

As Judge Kennedy noted in her spirited dissent, the effect of this decision is to hold Chrysler vicariously liable for racial slurs uttered by two hourly employees at different times to their supervisor. The Court has this Term agreed to hear Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), reh'g denied, 760 F.2d 1330 (D.C. Cir. 1985), cert. granted sub nom., PSFS Savings Bank FSB v. Vinson, 54 U.S.L.W. 3223 (1985) (No. 84-1979, 1985 Term), to explore the circumstances in which an employer can be held vicariously liable for sexual harassment of a subordinate employee by a supervisor under Title VII. The need for review of the erroneous decision in this case is

even more compelling than in Vinson. This is because the harassment here involves an employer's liability for subordinate name-calling of a supervisor, and because the statutory section in issue is 42 U.S.C. §1981. In contrast to Title VII, section 1981 requires a showing of intent to discriminate. General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982).

Prior to the Vinson case, the Court has never examined the standards for or the scope of an employer's liability for sexual harassment in the workplace. Likewise, the Court has never examined the scope of employer liability for racial harassment in the workplace, either under Title VII or under §1981. As the sixth circuit's citations to authority reflect, the number and frequency of racially hostile environment claims, like the number and frequency

of sexual harassment claims, is obviously growing as this decade progresses.

The essence of the employer-petitioner's vicarious liability argument in Vinson is that the employer was powerless to put an end to the alleged sexual harassment of plaintiff by her supervisor because the employer was unaware of plaintiff's complaints.

In this case, Mr. Erebia was a front-line plant supervisor in a unionized shop. Certain Chrysler senior management was aware of Mr. Erebia's complaints. In response to them, senior management told Mr. Erebia to build a case for disciplining his subordinates and to turn a deaf ear to the employees' slurs. The realities of a factory setting include name-calling and discipline problems. The front-line supervisor is the first line of management with authority and responsibility for

dealing with these problems. Management's response to Mr. Erebia's complaints of racial harassment, rather than simply condoning or ignoring them, was wholly consistent with Mr. Erebia's status as a front-line supervisor. This lawsuit does not concern the more typical complaints of harassment from a subordinate employee about a supervisor such as Mr. Erebia (although there were some), which would obviously necessitate investigation and discipline of the supervisor by other management. Any other response in this situation by Chrysler's senior management would have served only to undermine the authority of Mr. Erebia as a front line supervisor.

The essence of abusive environment claims, whether racial or sexual, is control and power over the work environment, and victimization and intimidation of

subordinates by those in control. *Cf.*, Note, Sexual Harassment Claims of Abusive Environment Under Title VII, 97 Harv. L. Rev. 1449, 1452-1453 and n.23 (1984); Vinson v. Taylor, 753 F.2d at 149-150. Here, a measure of that power and control lies with Mr. Erebia himself as the front line supervisor. Chrysler management responded in the only way it could consistent with the focus of power and control over the workplace in this case. At trial Chrysler requested and was denied an instruction that there were legitimate, nondiscriminatory business reasons for its actions, consistent with the procedural teachings of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Long v. Ford Motor Company, 496 F.2d 500,505 n.11 (6th Cir. 1974)(McDonnell Douglas order and allocation of proof apply with equal force to §1981 action). As in Vinson, Chrysler

management was functionally powerless to respond in any other way, albeit for different reasons.

In contrast, the Court of Appeals for the Fifth Circuit in the only other published decision involving subordinate racial harassment of a supervisor, Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983), handled the case consistently with the realities and practicalities of the workplace. See also, Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985), cert. denied, 53 U.S.L.W. 3895 (1985)(opinion indicates supervisor name-calling of another supervisor, but unclear if liability imposed on that basis). Plaintiff Hill, a black female supervisor, was allegedly harassed by three white subordinates. The fifth circuit concluded that plaintiff "stood above the remarks and her position or authority suffered nothing because of

them," and affirmed the district court's rejection of her claims.

In this case, the sixth circuit raised Chrysler management's "tolerance" and "condonation" of racial slurs against Mr. Erebia to the level of an inference sufficient to support a finding of intent satisfying the requirements of §1981. In contrast to the acknowledged principle of employer vicarious liability for a supervisor's acts* (which is being challenged in

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*See, e.g., Calcote v. Texas Educational Foundation, Inc., 578 F.2d 95, 98 (5th Cir. 1978) (racial harassment by supervisor in course of duties is enough to support finding that supervisor's acts are "deliberate" acts of employer); Young v. Southwestern Savings. & Loan Association, 509 F.2d 140, 144 n. 7 (5th Cir. 1975) (employer responsible under Title VII for supervisor's religious discrimination although supervisor had no authority to fire and employer had no opportunity to correct problem); Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (6th Cir. 1972) (employer answerable under Title VII for supervisor's racially discriminatory discharge of employee despite employer's "outstanding record in regard to fair and

Vinson), the employer in this case is effectively being held vicariously liable for a subordinate employee's acts under a statute requiring a showing of purposeful discrimination.

Indeed, the sixth circuit goes even beyond inferring that Chrysler management's "tolerance" constitutes intentional discrimination; it infers, beyond intent, active malice and oppressiveness sufficient to support a punitive damages award. But where the acts complained of are those of rank and file non-managerial employees directed at a supervisor, where the supervisor has been unable to demonstrate any

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(Footnote Cont'd)

impartial treatment of the races"); Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985), cert. denied, 53 U.S.L.W. 3895 (1985)(employer liable under §1981 for racially descriminatory actions of supervisor regardless of company's good faith).

actual injury and where the deliberate resonse of fellow management is the only action consistent with the realities of the workplace, the jury should not have even been permitted to consider an award of punitive damages in the first instance. As a matter of law, Chrysler should not be said to be guilty of malicious, oppressive or extraordinary misconduct under these circumstances.

The sixth circuit's decision in this case amounts to a different but even more exacerbated stretching of the doctrine of vicarious liability than occurred in Vinson because the statutory scheme under which it occurs requires a showing of intent. For these reasons, the Court's first review of the standards for holding employers liable in racial abusive environment claims under §1981 is appropriate at this time and in this case.

Section 1981, like other sections of the Reconstruction Era Civil Rights Acts, does not specify the availability of or standards for awarding damages, punitive or otherwise. Congress has offered some additional guidance in §1988, which provides that where the laws of the United States are deficient in the provisions necessary to furnish suitable remedies under the Civil Rights Acts, courts are to turn to "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States...". Unfortunately, however, recent case law under §1988, both within the specific realm of damages and in other areas such as statutes of limitation, survivorship and immunitites issues, is

confusing at best. It is unclear whether §1988 directs practitioners and courts to forum state common law, general state common law or federal common law for guidance in formulating damages and remedies rules under the Civil Rights Acts.

Damages under other sections of the Civil Rights Acts have been controversial areas of high interest to the Court in the last decade. See, Carey v. Piphus, 435 U.S. 247 (1978) (establishing standards for compensatory damages in §1983 procedural due process cases); Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981) (rejecting availability of punitive damages against municipalities in §1983 cases); Smith v. Wade, 103 S.Ct. 1625 (1983) (allowing and setting standards for punitive damages in §1983 case against an individual). However, the Court has not yet explored in detail damages issues and the application

of §1988 in §1981 actions. While the Court has stated that punitive damages are available under 42 U.S.C. §1981, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975), it has not yet amplified standards for awarding punitive damages thereunder. This case presents the appropriate circumstances and opportunity for clarifying both §1988 and its application to punitive damages issues in §1981 actions. The sixth circuit's reversal of the $10,000 compensatory damages award for failure to demonstrate actual injury and affirmance of the substantial $30,000 punitive award conflicts with the Court's recent interpretations of §1988 and the statutory intent of §1981.

The trial court correctly instructed the jury that punitive damages could not be awarded absent compensatory damages. In turn, the trial court distinguished compen-

satory damages from nominal damages and defined compensatory damages as those flowing from any injury plaintiff might have sustained as a result of the racial slurs. The sixth circuit turned the unappealed trial court instruction on end, and allowed the punitive damages award to stand in the face of its reversal of the compensatory damages award. The court of appeals cited only dicta in Rodgers v. Fisher Body Division, General Motors Corp, 739 F.2d 1102, 1109 (6th Cir. 1984) (opinion by Potter, J. of the United States Court for the Northern District of Ohio, Western Division sitting by designation), cert. denied, 53 U.S.L.W. 3669 (1985), as authority for the proposition that "punitive damages may stand independently of compensatory." However, the sixth circuit in Rodgers provided no analysis or citation of authority to support the principle so

stated, perhaps because the Court did not know quite where to turn for guidance in fashioning such a rule.

The leading court of appeals case in the civil rights sphere on the point whether punitive damages may be awarded without compensatory damages is the twenty year old decision in Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). In Basista, the Third Circuit determined that under 42 U.S.C. §1983 an award of punitive damages was appropriate even in the absence of proof of actual injury. The basis for its holding was that "the federal common law of damages commands the issue of damages in the case at bar," without any analysis of why the rule it established enhanced the purposes of §1983. The Basista reliance on federal common law as the source of guidance for establishing its rule is contrary

to this Court's analysis of §1988 in subsequent cases.

Specifically with respect to damages, the Court in Sullivan v. Little Hunting Park Inc., 396 U.S. 229, 240 (1969), interpreted §1988 to mean that:

> ...[B]oth federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v. Cherry, [5 Cir.] 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired. We do not explore the problem further, as the issue of damages was not litigated below.

Thus, the Court in Sullivan directed litigants and courts to look to whatever rule of law best expressed the policies of the particular civil rights statute in issue.

However, the Court in Robertson v. Wegmann, 436 U.S. 584, 589 n.5 (1978), observed, noting Basista, that "Section

1988's reference to 'the common law' might be interpreted as a reference to the decisional law of the forum State, or as a reference to the kind of general common law that was an established part of our federal jurisprudence at the time of §1988's passage in 1866." Robertson held that a forum state survivorship statute applied under §1983 to determine whether plaintiff's cause of action had abated. The Court's ruling caused plaintiff to lose its cause of action: "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Id. at 593.

In the same Term, in Carey v. Piphus, 435 U.S. 247 (1978), the Court determined standards for awarding compensatory damages in a §1983 procedural due process case. The Court extensively relied upon general

state tort law cases and principles, although not upon the law of the forum state in particular. Significantly, the Court specified, without amplifying upon whether it was determining the open question identified in Robertson, that "title 42 U.S.C. §1988 authorizes courts to look to the common law of the States where this is 'necessary to furnish suitable remedies' under §1983." 435 U.S. at 258, n.13. In conflict with the Robertson footnote, then, Carey seems to direct one to the common law in general as opposed to the common law of the forum state.

Recently, in fashioning a federal standard for awarding punitive damages under §1983, the majority in Smith v. Wade, 103 S.Ct. 1625 (1983), as in Carey, relied extensively upon general state common law tort principles in discerning the intent of the 42d Congress in enacting §1983 in 1871.

Mr. Justice Rehnquist's extensive dissent deriding altogether the availability of punitive damages under §1983 insisted that only resort to state and federal court decisions circa 1870 was appropriate. Mme. Justice O'Connor's dissent eschewed all such attempts to discern Congressional intent by looking to the tangled web of state and federal case law of any time period. Instead, Mme. Justice O'Connor explained, the rule which best accords with the policies of the statute itself is the only real and practical source of guidance for the courts.

The Court's most recent interpretations and applications of §1988 have occurred in the area of statutes of limitation. In Burnett v. Grattan, 52 U.S.L.W. 4916, 4918 (1984), Mr. Justice Marshall outlined the general application of §1988 in Civil Rights Acts cases:

> First, courts are to look to the laws of the United States so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." Ibid. If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. Ibid. A third step asserts the predominance of the federal interests: courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States.

Once again, however, it is not clear in Mr. Justice Marshall's formulation of §1988 procedure whether the general state common law or forum state common law is the appropriate source of guidance in taking the second step. Burnett analyzed which statute of limitations of the forum state should be applied in a §1981 action.

The three-step process outlined by Mr. Justice Marshall in Burnett was recently repeated in Wilson v. Garcia, 53 U.S.L.W. 4481 (1985). Wilson involved 42 U.S.C. §1983. In Wilson, the Court refined the

application of forum state statutes of limitation by uniformly characterizing §1983 claims as personal injury tort claims. Mr. Justice Marshall observed that Wilson principally involved "the second step in the process: the selection of 'the most appropriate' or 'the most analogous' state statute of limitations to apply to this §1983 claim." Id. at 4482. However, he then turned to federal law as the source for characterization of §1983 actions, to which characterization the appropriate state statute of limitations could then be applied.

These §1983 cases counsel by analogy at least the approach of looking to state common law, although it is now unclear whether they instruct application of general state common law or the common law of the forum state. They further specify statutory purpose as a source of guidance

in establishing a federal rule concerning whether a punitive damages award in a §1981 damages action can stand where there has been no proof of actual injury.

In conflict with this authority, Basista looked only to federal common law, not to state common law, in holding that actual injury is not a pre-requisite to a punitive damages award under §1983. Moreover, other courts of appeal stating that proposition of law conclusorily look to Basista as authority. E.g., Stolberg v. Members of Board of Trustees, 474 F. 2d 485, 489 (2d Cir. 1973) (dicta); Fisher v. Volz, 496 F. 2d 333, 347-370 (3d Cir. 1974); Silver v. Cormier, 529 F. 2d 926, 937 (10th Cir. 1976) (dicta); Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985), cert. denied, 53 U.S.L.W. 3895 (1985)(cites Basista approach of looking to federal law, then looks to California law).

The basic rule discernible from an examination of general state common law is that an award of punitive damages may not be made where actual injury has not been suffered. See, e.g., Basista, 340 F. 2d at 86, n. 11; Annot., 40 A.L.R. 4th 11, 18 (1985); but see, C. McCormick, Handbook on the Law of Damages §83(1935). Often in such cases, however, the meaning of the phrase "actual damages" is left undefined. As a result, most such case authority is unclear as to whether a nominal award would be comprehended within the term "actual damage." McCormick, supra. There is specific case law both for the proposition that denominated nominal damages will support a punitive damages award, e.g., Underwriters' Laboratories, Inc. v. Smith, 246 N.Y.S. 2d 436 (1934), and for the proposition that denominated nominal damages will not support a punitive damages

award, e.g., Behmyer v. Milgram Food Stores, Inc., 151 Kansas 921, 101 P.2d 912 (1932); Annot., supra 35.

In Ohio, the established rule is that "exemplary damages may not be awarded in the absence of proof of actual damages." Richard v. Hunter, 151 Ohio St. 185 (1949) (trespass upon land case); Seasons Coal Company, Inc. v. City of Cleveland, 10 Ohio St. 3d 77 (1984) (fraud case); Bishop v. Grdina, 20 Ohio St. 3d 26 (1985) (fraud case). In Seasons, the court of appeals assessed nominal damages of $1 and remanded the case to the trial court for a determination of punitive damages. The Supreme Court of Ohio reversed the court of appeals action, observing that "we believe punitive damages may not be awarded in the absence of proof of actual damages." Bishop reiterated the Seasons holding on November 13, 1985. Ohio law is clear that nominal

damages will not support an award of punitive damages.

Thus, a general examination of state common law, as seems to be indicated by Carey and Smith, produces little in the way of concrete guidance in formulating a federal rule. On the other hand, the interests of predictability, consistency and uniformity emphasized in Wilson would best be served by turning to forum state damages common law. Indeed, it seems likely that the trial judge in this case turned to the law of Ohio in formulating his jury instruction. Although the results would differ in different fora, the precise rule of application would be easily ascertainable in every forum, avoiding what is a confusing, uncertain and unproductive search through the annals of the common law of every state. In this case, the law of

the forum requires reexamination and reversal of the sixth circuit decision.

Such a rule requiring proof of actual injury as a prerequisite to a punitive damages award would be wholly consistent with the purposes and policies of §1981. The purpose of punitive damages is punishment of defendant, not compensation of plaintiff. The goals of the Civil Rights Acts are, in contrast, compensation of persons whose rights have been violated and deterrence of future civil rights infringements, not punishment of defendants. Robertson v. Wegmann, 436 U.S. at 591; Carey v. Piphus, 435 U.S. at 254-257 and n. 9. Both the compensation and deterrence functions are preserved in the award of compensatory damages and attorneys' fees under 42 U.S.C. §1988 where justified. Attorneys' fees were not even available to prevailing civil rights litigants under

§1988 until the statute was amended by Congress in 1976 to specifically include them. It is unlikely that a potential defendant would guide his conduct with respect to individual civil rights with an eye to whether punitive damages are available without actual injury or not; the interest in avoiding compensatory damages and attorneys' fees should be sufficient. Smith v. Wade, 103 S.Ct. at 1637. The weakest case of all for a substantial punitive damages award to punish a defendant occurs where, as here, no actual compensable injury has occurred.

The punitive damages question raised by the sixth circuit's decision is one of first impression in a controversial area of the law of demonstrated interest to this Court and importance to the ever-growing number of §1981 litigants. Because the court of appeals, not the district court,

created the factual circumstances which raised this damages issue, the necessity for review by this Court is heightened even beyond the importance of the substantive issue itself.

CONCLUSION

Shielding internal management relationships within the management team of a union-shop employer from statutory restraints imposed to protect rank-and-file employees, preserving state law foreclosing punitive damages in the absence of actual injury, clarifying federal statutory interpretations as to applicable damage law in discrimination cases and correcting a wrong, inconsistent result to prevent others: all of these opportunities are presented to the Court by this case. For the reasons discussed and explained above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

		Page
A.	Opinion Below	1a
B.	Judgment of the United States District Court for the Northern District of Ohio, Western Division, Hon. John W. Potter, January 12, 1984, in favor of plaintiff on plaintiff's §1981 racial slurs claim	54a
C.	Memorandum and Order of the United States District Court For the Northern District of Ohio, Western Division, Hon. John W. Potter, March 9, 1984, denying Defendant's Motion for Judgment Notwithstanding the Verdict, or, alternatively, for a new trial	55a
D.	Findings of Fact and Conclusionsof Law of the United States District Court for the Northern District of Ohio, Hon. John W. Potter, March 9, 1984, pertaining to dismissal of plaintiff's Title VII claims	59a

E. Supplemental Judgment of the United States District Court for the Northern District of Ohio, Western Division, Hon. John W. Potter, April 4, 1984, in favor of defendant on plaintiff's Title VII claims 70a

F. Order of the United States Court of Appeals for the Sixth Circuit, September 19, 1985 denying petition for rehearing en banc 71a

G. List of Corporate Petitioner's Parent Companies, Subsidiaries and Affiliates Pursuant to Supreme Court Rule 28.1 73a

No. 84-3291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Federico Erebia,	)	
	)	
Plaintiff-Appellee,	)	On Appeal from the United States District Court for the Northern District of Ohio.
	)	
v.	)	
	)	
Chrysler Plastic Products Corporation,	)	
	)	
	)	
Defendant-Appellant.	)	

Decided and Filed June 7, 1985

Before: Kennedy and Milburn, Circuit Judges; and Phillips, Senior Circuit Judge.

Phillips, Senior Circuit Judge, delivered the opinion of the Court, in which Milburn, Circuit Judge, joined. Kennedy, Circuit Judge, (pp. 20-22) delivered a separate dissenting opinion.

Phillips, Senior Circuit Judge. This case involves a claim under 42 U.S.C. §1981[1] alleging that defendant-appellant Chrysler Plastic Products Corporation was responsible for a hostile work environment where plaintiff-appellee Federico Erebia was subjected to ethnic slurs. The case was tried to a jury on January 10-12, 1984, in the Northern District of Ohio, Judge John W. Potter presiding. The jury returned a verdict in favor of plaintiff, awarding $10,000 in compensatory damages and $30,000 in punitive damages. Defendant appeals.

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[1]Title 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject

I

Plaintiff, a Mexican-American, brought this action in conjunction with claims alleging discrimination in layoffs, recalls, and denial of shift changes. The issue of recalls was tried before the court and jury under §1981 and Title VII, 42 U.S.C. §§2000e-2000e-17. At the close of all the evidence, the court granted Chrysler's motion for a directed verdict on the issues of shift changes, layoffs, and recalls. The court found in favor of Chrysler on the Title VII claim. The court denied defendant's motion with respect to the hostile work environment claim, finding there was sufficient evidence to present to the jury.

(Footnote Cont'd.)

to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The hostile work environment claim then was presented to the jury. Chrysler objected to the court's rejection of proposed jury instructions concerning plaintiff's participation in or incitement of ethnic slurs. The court denied the objection, finding the subject matter appropriate for closing argument rather than jury instructions. Following the jury verdict, the court denied defendant's motion for judgment notwithstanding the verdict in an order dated March 9, 1984.

Plaintiff Erebia testified in his own behalf and was his only witness. He testified he had lived in Mexico from age two until twenty-two, returning to the United States in 1957. His parents were Mexican. He had been employed by Chrysler Plastic Products Corporation for eighteen years beginning November 8, 1965. At the

time of trial he was an Inspection Supervisor. During much of his employment he has worked in the evenings as a supervisor in the calendar department, where ingredients are rolled into a film for production. He testified that he had worked in other departments as well.

Due to the statute of limitations period, plaintiff testified only to events occurring after February 3, 1977. He testified that after this date he had many problems with hourly employees. He testified that an hourly employee, Rolland Forney, who had a mailman classification, "kept calling me names, and it got to the point where, you know, you can only take so much. They're going to have to start answering because I have never got any backing from the company as far as for discipline." (T. 53). Erebia was called "a wet bag [sic], tomato picker." (T. 54).

Plaintiff testified that Rolland Forney refused to follow his instructions "every-day . . . on a daily basis" from 1977 until 1980 when Forney was laid off. Forney would refuse to follow instructions, as he told plaintiff, because "I was Mexican and he was white." (Id.).

Plaintiff referred to Marv Keegan, a production superintendent, as "my boss." (T. 48). Plaintiff complained to Keegan about the situation on virtually a daily basis. (T. 55). Keegan did nothing in response except to advise Erebia to "build up a case." (T. 54, 55).

Plaintiff testified that an hourly employee in the laminating department under his supervision, Wilbur Wood, also directed racial slurs at him. Plaintiff stated: "He mainly told me to go back to Mexico, there was some white person that could be doing my job instead of a Mexican." (T.

55). Wood refused to follow plaintiff's directions almost every day from April of 1980 to the end of July the same year, when Erebia was laid off. (T. 56).

Plaintiff stated that he constantly kept seeing his boss, Keegan, about the problem and approached the general foreman, Jim Lilje, as well. (Id.) The managers did nothing in response. (T. 57). Erebia discussed the problems on two occasions with personnel manager Jack Lenz. Plaintiff testified: "His advice was that I was a hot headed Mexican, that I should put a deaf ear to it, that it was nothing but shop talk to me." (Id.) Plaintiff replied that "everybody was just too much to be ignored." (T. 57-58).

At a second meeting with Lenz in the summer of 1977, plaintiff explained that the employees refused to abide by his instructions and abused him constantly.

(T. 260). He was told that he should take the slurs and abuse "like nothing." (Id.) Erebia was "highly upset" about the abuses and failure to follow instructions and the poor backing of management. (T. 259). He criticized management. Lenz became upset and made the statement, "I'll hurt you economically." (T. 58, 260).

On cross-examination, Erebia admitted that he engaged in "shop talk" and that it was common in his employment to use profanity. (T. 82). He also admitted that he had called an hourly employee a "gringo" after the employee had called him a "wet back." (T. 82-83). Plaintiff admitted that he had, in December of 1977, told the husband of a plant worker, a Mr. Baum, that he should go back to Germany and he was a "queer communist." (T. 83-84).

Plaintiff testified that "shop talk" is an exchange that is acceptable to both

parties involved and would not encompass conversations to which someone objects. (T. 91). He testified that he had not used any slurs where anyone objected. (Id.) He stated that he knew of no cases other than his own where racial slurs were directed to supervisors by hourly employees. (Id.)

The defense did not call as witnesses any of the individuals plaintiff said had slurred him. Nor did it call any of the management employees plaintiff testified had failed to respond to his complaints. Instead, it called Chester R. Ferguson, the labor relations and hourly employment supervisor at the Sandusky plant. Plaintiff had testified that he understood the policy on reporting racial slurs required him to report first to his immediate supervisor, the general foreman. The foreman in turn, relays the complaint to the superintendent or supervisor, who

finally reports it to Ferguson. (T. 68). Plaintiff testified that he was never instructed to give a racial slur complaint to Ferguson. (Id.)

Ferguson was responsible for disciplinary and grievance procedures. He was assigned additional functions after the major layoffs in 1979 and 1980. (T. 114). Ferguson had the responsibility of investigating whether violations of plant rules had occurred and could authorize any disciplinary measures requested by supervisors and lower management. (T. 148, 186). Ferguson testified that Erebia did not complain to him about the ethnic slurs to which he was subjected. Nor did plaintiff's supervisors make him aware of the verbal abuse reported by plaintiff. (T. 148).

Although Ferguson was unable to give specifics, he testified that he had received complaints by hourly employees of general verbal abuse by Erebia. (T. 149-51). He testified that the union had pressed a complaint regarding the incident where plaintiff made abusive statements to Baum, a white individual and the husband of a plant employee. (T. 190). He regarded this as a racial slur. (T. 150-51, 190). In that case, management through Ferguson investigated the complaint. The incident was resolved as an exchange and the parties were admonished "to conduct themselves in a better businesslike manner." (T. 151). As noted earlier, no such investigation or measures were taken with regard to plaintiff's complaints.

A former union representative at the plant, James Hackworth, testified that an hourly employee, Larry Torres, Jr., had

complained of an argument with Erebia in 1977 in which curses were used. (T. 194-95). The incident was resolved informally on the plant floor. (T. 196). Erebia stressed that no slurs were exchanged in that incident. (T. 266).

II

We turn first to appellant Chrysler's contention that there was insufficient evidence to support the jury's verdict that Chrysler intentionally discriminated against plaintiff by maintaining a discriminatory working environment. The cause of action for hostile work environment was first recognized in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). That case, like many cases following it, was decided under Section 703 of Title VII, 42 U.S.C. §2000e-2(a), which makes it unlawful to

discriminate with respect to terms, conditions, or privileges of employment.

Although Title VII clearly applies to national origin discrimination, section 1981 is not so specific. Appellant has not maintained, however, that section 1981 does not cover the charges Erebia has brought in this case. Although courts have had some difficulty with cases alleging only national origin discrimination under section 1981, where there are allegations that discrimination against Hispanics is of a racial character a cause of action under section 1981 has been recognized. See Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (per curiam) (dismissal of section 1981 claim brought by a Mexican-American was improper because "prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said

to be racial prejudice under §1981"); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (reversing dismissal of a section 1981 action brought by a Mexican-American and holding that racial discrimination is not to be limited to the technical or restrictive meaning); Oritz v. Bank of America, 547 F.Supp. 550 (E.D. Cal. 1982); Pollard v. City of Hartford, 539 F.Supp. 1156, 1165 (D. Conn. 1982); Madrigal v. Certainteed Corp., 508 F.Supp. 310 (W.D. Mo. 1981); Aponte v. National Steel Service Center, 500 F.Supp. 198, 202-03 (N.D. Ill. 1980); LaFore v. Emblem Tape and Label Co., 448 F.Supp. 824 (D. Colo. 1978). In the present case section 1981 clearly applies because the slurs Erebia testified about were of a racial character. Erebia reported statements such as "I was Mexican and he was

white" (T. 54) and "some white person could be doing my job instead of a Mexican," (T. 55).

In Rogers v. EEOC, supra, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), Judge Goldberg held that an employee of Spanish origin surnamed American had a cause of action against an employer for "the practice of creating a working environment heavily charged with ethnic or racial discrimination." He stressed that while the simple utterance of a racial epithet would be insufficient to assert a cause of action, an action under Title VII would lie where a working environment is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group members." Id.

Courts addressing claims of hostile working environment have emphasized that incidents of racial slurs must be more than sporadic and that the plaintiff must demonstrate that management failed to take adequate steps to remedy the situation. See generally, Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981). In Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (per curiam), the court found that the use of ethnic slurs by a supervisor did not amount to a violation of Title VII. The plaintiff, a former employee hired to supervise ticket takers, sued for damages for a stadium director's references to him as a "dago" and other Italian-American employees as "mafia." The trial court found that the comments were part of casual conversation and were not so numerous as to rise to a Title VII violation. Id. at 88. The

Eighth Circuit affirmed, holding the findings were not clearly erroneous. The court did not find it necessary, therefore, to address the claim under section 1981. Id.

The Eighth Circuit addressed the issue again in Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981). There two black plaintiffs brought suit under Title VII and section 1981 for discriminatory work practices including hostile work environment. The court noted: "Unquestionably, a working environment dominated by racial slurs constitutes a violation of Title VII. Id. at 1257. Noting that a claim for hostile were environment depends on the degree of harassment, id., the court considered the evidence found by the Court not to violate Title VII. The court observed that the evidence conflicted sharply. While the plaintiffs testified

that supervisors and fellow employees often referred to them as "niggers," the plant manager stated that he never heard such references and would have reprimanded those responsible. There was testimony by other employees corroborating each side. Id. The court held that the use of racial slurs, if any, "was infrequent, was limited to casual conversation among employees, and with possible rare exceptions was not directed toward appellants." Id. The court contrasted the circumstances in EEOC v. Murphy Motor Freight Lines, Inc., 488 F.Supp. 381, 384 (D. Minn. 1980) where the use of slurs and the incidence of harassment were more frequent and the plaintiff prevailed. The court noted the resolution under Title VII was dispositive of the section 1981 claim as well. 646 F.2d at 1252 n. 1.

Another case upon which appellant relies is Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982). There the plaintiff, a black offshore oil rig roustabout, brought a section 1981 and Title VII claim against his former employer alleging discrimination in a "racially charged employment atmosphere" that caused him to resign. The district court in a bench trial found for the defendant and the Fifth Circuit affirmed. The court found that life on the oil rig was rough and rowdy, with frequent pranks, practical jokes, and verbal abuse. Id., at 923. The plaintiff was referred to by other employees as "nigger," "coon" and "black boy," but joined in "similar opprobrium" himself which the record showed "were bandied back and forth without apparent hostility or racial animus." Id. at 924. The court emphasized that relations between the

plaintiff and fellow employees were friendly and cordial. Id. The court recited two incidents where the plaintiff was exposed to racial slurs that were more serious. In one, an independent crane operator directed racial slurs at the plaintiff in an angry tone after the plaintiff was almost struck by the crane load. The head employee, however, immediately responded, evidenced his displeasure and took the matter up with the operator's foreman. Id. In the second incident, a racial slur and stereotype arose during a television news report. The head employee, the Toolpusher, again immediately admonished the men responsible that "they should have some respect for [the plaintiff]." Id.

The court held that the finding of no malicious or inordinate racial slur usage was not clearly erroneous. Id. at 925.

It stressed that all employees were subject to the same pranks and that plaintiff himself did not believe he was singled out for treatment. Id. The court emphasized that the plaintiff's perception of the environment is a "significant factor" because a determination whether discrimination exists is a subjective inquiry. Id. The court also rejected the plaintiff's constructive discharge claim. Id. at 926-27.

Other courts have emphasized management's response to complaints, viewing it as an important element in a hostile work environment. In Bell v. St. Regis Paper Co., 425 F.Supp. 1126 (N.D. Ohio 1976), Judge Leroy J. Contie, Jr., then a District Judge, denied relief on a hostile work environment claim under Title VII and section 1981. The court noted that "an employer covered by the terms of Title VII

may be legally responsible for the acts of harassment of its employees merely by condoning them." Id. at 1137. Stressing that management had responded quickly to each claim of harassment, meeting with the employees concerned, warning them of penalties for harassment, investigating the charges, and hiring an outside consultant to consider the allegations, the court held that management's actions had not condoned or permitted the harassment of the plaintiff. Similarly, in Howard v. National Cash Register, 388 F. Supp. 603 (S.D. Ohio 1975), the court denied relief on a harassment claim, finding that management had not failed to investigate complaints or proceed in a diligent manner and had disciplined an employee who used the word "nigger" in the presence of the plaintiff. Id. at 605. The court stressed that the plaintiff was not "subjected to a concerted pattern of

harassment by workers whic.. the company knew about and did not attempt to stop." Id. at 606 (quoting Fekete v. United States Steel Corp., 353 F.Supp. 1177, 1186 (W.D. Pa. 1973)). See also Friend v. Leidinger, 588 F.2d 61, 67 (4th Cir. 1978) (findings of no harassment not clearly erroneous because the employer had taken disciplinary action against white officers and employees who harassed blacks and the incidents involved were isolated and contrary to the employer's policy); Higgins v. Gates Rubber Co., 578 F.2d 281, 283 (10th Cir. 1978) ("Absent a finding that Gates was or should have been aware of this unfavorable atmosphere, we cannot hold that the trial judge erred as a matter of law by not finding Gates in violation of the Civil Rights Act.").

In DeGracé v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980), a civilian employee of the

Navy brought a Title VII action alleging that his discharge for failure to return to work was improper because his absence was caused by threats and harassment by other employees. The district court had found pervasive racism in the plaintiff's department, but denied punitive and compensatory damages because they were unavailable under Title VII. The First Circuit affirmed the district court's finding that the plaintiff's supervisors should have been aware of the offensive conduct -- offensive and threatening notes left in the plaintiff's locker. The court held that the employer had an affirmative duty to correct the harassment: "An employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers, and thus defendants must accept responsibility for their supervisors' derelictions, if such existed, in responding to the

racial problem at [the workplace]." Id. at 803 (citations omitted). The court emphasized that an employer who takes reasonable steps to correct and prevent racial harassment is not subject to liability. Id. at 805. The court remanded for proceedings on the reasonableness of the plaintiff's failure to return to work. Id. at 806.

In a case such as this where the trier of fact has found a hostile work environment and the employer's responsibility by its refusal to address the problem, the case comes to this Court in a different posture from a claim denied in the District Court. It is the function of the jury to consider creditability and other factors at play in plaintiff's claim. The jury determination will not be overturned lightly. Chrysler maintains that this case should be reversed merely because it

arguably comes within the circumstances of cases upholding a denial of a claim on appeal under a clearly erroneous or substantial evidence review. Our task, however, is to determine whether the jury verdict is supported by substantial evidence. See Anderson v. City of Bessemer City, — U.S. —, No. 83-1623, 53 U.S.L.W. 4314, 4317 (March 19, 1985).

In Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982), the court affirmed a district court's finding of liability under Title VII. The Walker plaintiff, while in a training program, was assigned to a dealership in Tampa, Florida. The plaintiff, a black male, complained to Ford and the dealership management about employees using racial epithets, referring to poorly-repaired cars as "nigger-rigged" and the employee with the lowest sales as the "black ass." Id. at 1358. An employee had

called the plaintiff a "dumb nigger" and later apologized. There were other references to "niggers" in conversations about customers. The district court had awarded back pay because the plaintiff was discharged after incorrectly being reported absent, but denied compensatory and punitive damages because they were not available under Title VII.

The Eleventh Circuit rejected Ford's contention that racial slurs were insufficiently pervasive to rise to a Title VII violation. The court observed that "an employer violates Title VII simply by creating or condoning an environment at the workplace which significantly and adversely affects [the psychological well-being of] an employee because of his race or ethnicity, regardless of any other tangible job detriment to the employee." Id. at 1358. The harassment "must be sufficiently

pervasive as to alter the conditions of employment and create an abusive working environment." Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The court upheld the district court's finding that the use of slurs was "repeated," "continuous" and "prolonged" despite the plaintiff's objections, emphasizing the finding was not clearly erroneous. 684 F.2d at 1359. The court found the requisite manager participation in a statement to the plaintiff by the Ford trainee manager that the slurs were "just something a black man would have to deal with in the South." Id. The court upheld the judgment for a Title VII violation and proceeded to affirm a finding of retaliatory discharge. The court affirmed the denial of compensatory and punitive damages, holding them unavailable under Title VII. Id. at 1363-64.

In the present case, we find that the jury's verdict was supported by substantial evidence. Plaintiff's uncontested testimony was that he was subjected to slurs from February 1977 to July of 1982. His uncontested testimony was that he reported the slurs regularly during that period to three different managers who at best did nothing in response or, at worst called him a "hot-headed Mexican" or threatened him with economic harm. There is clearly substantial evidence on both the elements of repeated slurs and management's tolerance and condonation of the situation.

Chrysler emphasizes that this action was brought under section 1981 and not Title VII. A claim under section 1981 requires proof of intentional or purposeful discrimination. General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982); Leonard v. City of

Frankfort Electric and Water Plant, 752 F.2d 189, 193 (6th Cir. 1985). The district court charged the jury that to find for plaintiff it had to "find that the defendant intentionally or purposefully discriminated against plaintiff because he is a Mexican American." (T. 339). The court further required the jury to find "the failure or refusal to instruct plaintiff's subordinate co-workers to refrain from using racial slurs directed against plaintiff was intentionally based on plaintiff's race." (T. 341). The court noted that plaintiff claimed defendant violated section 1981 by intentionally treating him differently from white employees because of his race. (T. 340).

Chrysler asserts that the jury's verdict of intentional discrimination is not supported by substantial evidence because there was insufficient proof that

management treated plaintiff differently from other supervisors. Chrysler relies heavily on Smith v. Pan Am World Airways, 706 F.2d 771 (6th Cir. 1983) (Per curiam). In Smith the plaintiff, a black female, had complained that a white male flight attendant had insulted her during a flight. Pan Am made diligent efforts to investigate, interviewed flight attendants including the individual involved, and arranged a hearing that the plaintiff refused to attend. The company learned, after the plaintiff filed a claim with the EEOC, that the plaintiff considered the incident sexual and racial harassment. The district court granted summary judgment to the employer on the section 1981 claim, finding the plaintiff did not provide the company the opportunity to resolve the problem, that the incident was an isolated occurrence, and that there was no indication the company had condoned

the remarks in any way. Id. at 773. This Court affirmed, finding no evidence of racial animus on the part of Pan Am. Failure to discipline did not imply discrimination because the company was unaware of the nature of the complaint, thoroughly investigated the complaint, and did not depart from past practice of disciplining employees. Id. The Court held that the plaintiff did not present evidence as required that the company treated her differently from white employees and that disparate treatment was the result of a discriminatory purpose. Id. at 773-74 (citations omitted).

In Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189 (6th Cir. 1985), this Court reversed a summary judgment entered for the defendant Board on section 1981 and Title VII employment discrimination claims. The plaintiff,

a black male, alleged he was subjected to a long course of harassment by supervisors and co-workers, leading to his discharge for throwing his headgear toward a supervisor in a gesture of frustration. The plaintiff brought a charge of discrimination alleging the defendant Board failed to promote him, discharged him, and subjected him to discriminatory terms and conditions of employment on account of his race. The EEOC found probable cause to believe there was discrimination, stating in part: "Title VII requires an employer to maintain a working environment free of racial intimidation. That requirement includes positive action where positive action is necessary to redress or eliminate intimidation." Id. at 192 n.7. The district court granted summary judgment on the section 1981 claims because the plaintiff failed to allege invidious discrimination. The court

also granted summary judgment on the discharge claim but tried the claim based on promotions and working conditions under Title VII.

This Court reversed the summary judgment, finding that the complaint set forth sufficient factual allegations of discriminatory intent to state a section 1981 claim. Id. at 193. The Court noted that section 1981 requires a demonstration of purposeful discrimination, but held the plaintiff may establish intent circumstantially "by alleging and proving discriminatory conduct, practices, or the existence of a significant racially disproportionate impact." Id. (citations omitted). Finding an unresolved issue of material fact with respect to the Board's intent, this Court remanded for further proceedings. The Court noted that the plaintiff would have additional damage

remedies available under section 1981 on remand. Id. at 195.

Appellee's construction of the Smith case as requiring in all cases a demonstration that an employer treated harassment claims of minority employees differently from those of white employees would erode severely the important protections courts have recognized under section 1981. An employer with a small number of minority employees could allow them to be harassed and subjected to slurs, simply do nothing, and avoid responsibility and liability simply because the minority employees can produce no incidents of harassment of white employees as contrasting treatment. The element of intent required in section 1981, as noted in Leonard, can be proved circumstantially. An employer intends discrimination where he condones racial harassment of employees.

In Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981), the court upheld a district court's finding of employer liability under section 1981 for constructive discharge and maintenance of a hostile work environment. The district court had found the defendant liable for intentional discrimination in the constructive discharge of a black employee forced by a noxious racial atmosphere. The district court found that a white person would not have been treated in the same fashion. Id. at 1198. The plaintiff produced testimony that the workplace, a National Guard installation, was permeated with racial slurs, racially offensive jokes, hostility to blacks, and differing treatment of black workers. Id. at 1198-99. The pervasive atmosphere of prejudice was such that the employer must have become conscious of it. Id. at 1199. The court held that the plaintiff was

entitled to relief under section 1981 for intentional discrimination upon sufficient proof of racial discrimination. Id. at 1200. It stressed that the district court's "'ultimate' finding of fact - that plaintiff bore her burden of persuasion that she had been the victim of deliberate discrimination - was well supported by factual findings that are not clearly erroneous." Id. at 1201 (citations omitted). The court stressed that the fact the supervisor charged with discrimination did not testify "speaks volumes." Id. at 1202.

Courts have considered a number of hostile work environment claims under both Title VII and section 1981. The hostile work environment claim is not a disparate treatment claim that requires no showing of intent. Courts have not erected a barrier to section 1981 claims for hostile work

environment by requiring proof that management received complaints of harassment from white employees. See Rodgers v. Peninsular Steel Co., 542 F.Supp. 1215 (N.D. Ohio 1982); Lucero v. Beth Israel Hospital, 479 F.Supp. 452 (D. Colo. 1979).

The jury's finding of intentional discrimination by Chrysler management is supported by substantial evidence. Management was aware of plaintiff's many complaints of harassment and condoned the situation by taking no steps to improve conditions and by seeking to intimidate plaintiff. No showing that it received complaints from white supervisors of harassment by minorities and responded differently is required. However, we observe that management, through Ferguson, did investigate a complaint presented to him by a white employee against Erebia in regard to the incident with Baum. There

was no investigation of plaintiff's complaints, ostensibly because they were not presented to Ferguson. The fact that plaintiff's complaints were not relayed to Ferguson is the substance of plaintiff's complaint - lack of response by management.

Before turning to the issue of damages, we consider appellee's challenge to the jury instructions. There is no merit in Chrysler's contention that the jury should have been instructed on "legitimate nondiscriminatory reasons" and "pretext" for Chrysler's actions. Such instructions are not appropriate in this area. Nor is there merit in Chrysler's argument that the jury should have been instructed that plaintiff cannot prevail if he participates in or condones an exchange of slurs. The district court concluded correctly that

this issue was appropriate for the arguments of counsel rather than jury instructions. Counsel for appellee argued vigorously in her closing argument that an exchange or "crossfire" of slurs established that there was no hostile work environment. We conclude that the district court gave thorough instructions to the jury.

III

Appellee challenges the jury's award of $10,000 compensatory damages arguing there was insufficient proof of actual injury such as emotional distress, embarassment, or humiliation. Courts have allowed recovery under section 1981 for emotional distress, but there must be sufficient evidence to support the award. Morrow v. Igleburger, 584 F.2d 767, 769 (6th Cir. 1978), cert. denied, 439 U.S. 1118 (1979).

In Carey v. Piphus, 435 U.S. 247, 264 (1978), the Supreme Court held that compensatory damages cannot be awarded absent proof of injury. The court, in a procedural due process case, noted that emotional distress may be proven "by showing the nature and circumstances of the wrong and its effect on the plaintiff." Id. at 263-64. Distress injury may be evidenced by one's conduct and observed by others. Id. at 264 n. 20. The Court emphasized that difficulties of proof did not excuse the requirement of proof that such injury actually was caused. Id. at 264. The Court remanded the case for an award of nominal damages if the trial court found the school suspensions justified. Id. at 267.

In Rodgers v. Fisher Body Division, General Motors Corp., 739 F.2d 1102 (6th Cir. 1984), petition for cert. filed, 53

U.S.L.W. 3675 (March 19, 1985), this Court discussed the standards of proof of mental distress required in a section 1981 action. The plaintiff sought recovery based on his testimony that he suffered humiliation after his layoff because an error in the employment security office left him without unemployment compensation. He testified that his humiliation resulted from long waits at the employment security office, the repossession of his automobile, and his inability to provide for his family. Id. at 1108. This Court was unable to determine which part of the $300,000 award the jury apportioned to lost wages and which part was attributed to emotional distress. Id. We found the evidence insufficient to support the high compensatory damages award whether for emotional harm or for lost wages. Id. The Court therefore remanded the case for trial solely on the issues of

compensatory and punitive damages. Id. at 1109. The Court stressed: "While jurors might easily infer that going on welfare and losing one's car would cause emotional distress, plaintiff has not demonstrated his mental distress with the specificity required by Carey v. Piphus." Id. at 1108.

In the present case, plaintiff's only proof of emotional harm consisted of his statements that he was "highly upset" about the slurs and that "you can only take so much." His conduct in complaining to management on a regular basis also demonstrated a high level of concern. This proof, however, is insufficient to support the verdict for compensatory damages because it does not satisfy the requirements of Rodgers and Carey V. Piphus. This case is therefore remanded to the district court with directions to award nominal compensatory damages.

We reject appellee's contention that there was insufficient evidence to support the punitive damages award. As noted in Rodgers, "punitive damages may stand independently of compensatory." 739 F.2d at 1109. The issues of willfulness underlying the punitive damages award are separate from issues relating to compensatory damages. The jury awarded punitive damages based on instructions requiring it to find the defendant's actions were "wanton or oppressively done." (T. 342). The court stated that a "failure to act is wantonly done if done in reckless or callous disregard of or indifference to the rights of one or more persons, including the injured person." (T. 343).

The jury's award for punitive damages was supported by substantial evidence. Plaintiff testified that he continuously brought the problem of racial slurs to the

attention of his supervisors and that they failed to take any action to rectify the situation. It is significant that Chrysler did not introduce as rebuttal witnesses any of the employees named by Erebia as having bombarded him repeatedly with ethnic slurs on virtually a daily basis. Neither were the supervisors to whom Erebia testified that he made complaints and asked for relief over and over again called as witnesses. Malice may be inferred from conduct and surrounding circumstances. Additionally, the jury could find malice in Lenz's threat that he would hurt plaintiff economically for pursuing his complaints of harassment. Because the award is supported by substantial evidence, the court did not abuse its discretion in denying the motion for a new trial. Accordingly, the punitive damages award must stand.

This case is Affirmed in part, Reversed in part, and Remanded. Costs in this Court are taxed against appellant.

Kennedy, Circuit Judge, dissenting. I agree with the majority that persons of Mexican ancestry are entitled to the protection of section 1981 where, as here, they are discriminated against based on some perceived racial differences, as opposed to mere national origin discrimination. As noted in Madrigal v. Certainteed Corp., 508 F. Supp. 310 (W.D. Mo. 1981), Mexican-American ancestry is understood to signify a mixture of Spanish and Indian origins. I do not agree, however, that the evidence of discrimination in this case is sufficient to support a section 1981 violation.

As stated by the majority, an employer may be held liable for discrimination under a "hostile working environment" theory if

the employer tolerates a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability for minority group members." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). To establish a racially hostile working environment Erebia, a production foreman at Chrysler, relies on his testimony concerning two employees formerly under his supervision. Erebia testified that Rolland Forney refused to follow Erebia's instructions on a daily basis, from 1977 until Forney was laid off in 1980, because Erebia was Mexican and Forney was white; and that Forney would call Erebia names such as "wetback" and "tomato picker." Erebia further testified that from April 1980 to August 1980, when Erebia was foreman in a different department, he was subjected to racial slurs by

Wilbur Wood, another subordinate. Since the two subordinates were in different departments, Frebia was subject to harassment by only one employee at any particular time.

The court in Johnson v. Bunny Bread Co., 646 F.2d 1250, 1297 (8th Cir. 1981), articulated the applicable standard as follows: "Unquestionably, a working environment dominated by racial slurs constitutes a violation of Title VII. This is not to say, however, that all racial slurs rise to the level of Title VII violations. In this area, we deal with degrees." Racial remarks by a single subordinate do not create a working environment dominated by racial slurs. Racial harassment directed at an employee by a single supervisor can sufficiently poison the employee's working atmosphere, since a supervisor can dominate the work-

place with respect to his subordinate. The attitudes of a number of co-employees can also control one's working atmosphere. But here we have the weakest case of all - a foreman claiming that a single one of his subordinates has, by using racial epithets, "dominated" the foreman's working environment.

The degree of racial hostility found to constitute a racially charged working atmosphere in other cases has been considerably greater and more widespread than that faced by Erebia. For example, in EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381 (D. Minn. 1980), a black employee was subjected to a pattern of racial epithets written on blackboards and on signs on trucks; Ku Klux Klan crosses in the workplace; and constant racial harassment in the lunchroom by co-employees. Supervisors joined in the harassment and

told the plaintiff he was a disgrace to his race. Taylor v. Jones, 653 F.2d 1193, 1198-91 (8th Cir. 1981), involved a department-wide "dismal" racial atmosphere characterized by threats, fights, epithets, and display of a hangman's noose. Patterns of racial epithets by supervisors were held sufficient in Leonard v. City of Frankfort Electric and Water Plant, 752 F.2d 189 (6th Cir. 1985), and Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982). The bigotry of one subordinate does not poison the working atmosphere to the extent it was poisoned in these cases.

A §1981 violation requires a finding of intentional discrimination on the part of the employer. Intent may be inferred from the employer's tolerance of racial harassment "sufficiently pervasive as to alter the conditions of employment and create an abusive working environment,"

Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). An employer free of discriminatory motives would not tolerate disruption of the workplace by racial harassment. Such an inference is not proper where, under the circumstances, a nondiscriminatory employer would not be expected to take further action. Here the employer's actions are fully consistent with the inference that Erebia's supervisors merely expected their foreman to handle a problem with his subordinate by himself. Erebia's immediate supervisor repeatedly told him to "build a case." Specific times, places, and witnesses would be needed to discharge or suspend a union employee. There is no evidence that Erebia, an experienced foreman, did build his case. The personnel manager, Lenz, advised Erebia that he should ignore verbal abuse from subordinates and not pay any

attention to shop talk. The later of Erebia's two complaints to Lenz was in the summer of 1977, five and one-half years before suit was filed. An inference of intent to discriminate, proper when management tolerates racial harassment by supervisors or co-employees, is not necessarily proper when management tolerates a racially-based disciplinary problem a foreman has with a subordinate. The racially charged hostile working atmosphere referred to in Title VII cases is thus needed to supply the intent element as well as the discrimination element of a §1981 claim.

The existence of a racially charged work atmosphere is a prerequisite to a finding of discrimination in this case. After stating this standard, the majority holds the employer liable for tolerating "repeated slurs" without considering whether repeated slurs by a subordinate are

sufficient to establish a racially charged working atmosphere. In doing so the majority in effect holds the employer vicariously liable for the bigotry of an employee. As I would not find the evidence in this case sufficient to permit the jury to find a racially charged working atmosphere, I would reverse the judgment of the District Court. Where I to reach the issue, I would agree with the Court that plaintiff failed to prove compensatory damages.

Accordingly, I respectfully dissent.

Judgment in a Civil Case

United States District Court
Northern District of Ohio,
Western Division

Federico Erebia — No. C 83-96

v. — John W. Potter

Chrysler Plastic Prod.
Corporation

IT IS ORDERED AND ADJUDGED

that the plaintiff Federico Erebia recover of the defendant Chrysler Plastic Prod. Corporation the sum of $10,000 for compensatory damages and $30,000 for punitive damages, with interest thereon at the rate of 10.10% as provided by law, and his costs of action.

/s/ John W. Potter
UNITED STATES DISTRICT JUDGE

[Filed 1984 JAN 12 AM 8:01 CLERK U.S. DISTRICT COURT NORTHERN DISTRICT TOLEDO, OHIO]

Clerk: James S. Gallas Toledo, Ohio
(By) Thomas L. VanWormer 1-17-84

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Federico Erebia,

Plaintiff — Case No. C 83-96

v.

Chrysler Plastic Products Corporation, — MEMORANDUM AND ORDER

Defendant

POTTER, J.:

This cause came to be heard upon defendant's motion for judgment notwithstanding the verdict or, alternatively, for a new trial, and plaintiff's response thereto. Also before the Court is plaintiff's motion for an award of attorney's fees and defendant's response thereto.

The Court will deny defendant's motion for judgment notwithstanding the verdict or for a new trial.

Plaintiff has requested attorney's fees in the amount of $3,315.00 pursuant to 42 U.S.C. §1988. The parties have waived oral argument and have agreed that the Court shall determine the issue of attorney's fees on the briefs. Defendant asserts that plaintiff should be denied attorney's fees on the authority of Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983). In Hensley, the Supreme Court ruled that, in determining the amount of attorney's fees which may be properly awarded to a prevailing party under 42 U.S.C. §1988, a district court must consider the extent to which the party succeeded on his claim. Where the plaintiff fails to prevail on a claim unrelated to a successful claim, he is not to be awarded attorney's fees for the hours which counsel spent in pursuit of the unsuccessful claim.

The Court finds that plaintiff was a "prevailing party" under the standard articulated in Hensley, having succeeded on one of his five claims. The Court further finds that the five claims were "related", all of them having arisen out of his employment relationship with defendant. It would in this case be difficult it not impossible to apportion the time plaintiff's attorney expended on a claim by claim basis.

The billing statement submitted by plaintiff's attorney in support of his motion for attorney's fees is sufficiently detailed to aid the Court in its determination of what fee is reasonable. In his affidavit in support of the motion for attorney's fees, plaintiff's counsel states that he has computed his fee at an hourly rate of $85.00 rather than at his customary hourly rate of $125.00. The Court finds

that a fee of $3,315.00 is reasonable in the light of the complexity of the case and the results which plaintiff has obtained.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that the defendant's motion for judgment notwithstanding the verdict be, and the same hereby is, DENIED; and it is

FURTHER ORDERED that plaintiff's motion for attorney fee's in the amount of $3,315.00 be, and the same hereby is, GRANTED.

/s/ John W. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Federico Erebia,

Plaintiff Case No. C 83-96

v.

Chrysler Plastic Products Corporation, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant

POTTER, J.:

This is an employment discrimination action, Count I of which asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and Count II of which asserts claims under 42 U.S.C. §1981. The Title VII issues were tried to the Court and the 42 U.S.C. §1981 issues to a jury on January 10, 11 and 12, 1984. This matter is before the Court for a decision on the merits of plaintiff's claim of discriminatory recalls under Title VII.

Both parties submitted trial briefs.

The defendant submitted proposed findings of fact and conclusions of law pursuant to order of the Court. The Court has considered these proposed findings of fact and conclusions of law and has made its own independent determination.

Findings of Fact

1. Plaintiff is an individual and resident of Ottawa County, Ohio. Plaintiff is a Mexican-American.

2. Defendant Chrysler Plastic Products Corporation ("Chrysler") is a corporation qualified to do business in Ohio and is engaged in manufacturing operations in its plant at 3130 West Monroe Street in the City of Sandusky and the Court of Erie, Ohio.

3. Plaintiff has been, and continues to be, employed by defendant and its predecessor Air Reduction Corporation since

1965. In 1969, plaintiff was promoted from an hourly position in the calendar department to the position of production foreman in the calendar department, a salaried supervisory position.

4. Beginning in 1979, adverse economic conditions resulted in defendant Chrysler's decision to lay off supervisory and hourly personnel at the Sandusky plant. From 1979 through 1983, the number of salaried workers at the Chrysler Sandusky plant dropped from 138 to 65. The overall number of workers employed at the plant decreased by over 50% during that period.

5. Between August of 1980 and April of 1983, plaintiff was laid off on four occasions. Plaintiff was also recalled from layoff on four different occasions. From 1969 when plaintiff was promoted to management until his last recall in April, 1983, plaintiff had always been permanently

classified as a production foreman in the calendar department.

6. Plaintiff timely filed a charge with the Ohio Civil Rights Commission on March 13, 1981 respecting the recall of a white production foreman, Wayne Russell, on March 9, 1981 before plaintiff was recalled. On February 16, 1982, the Ohio Civil Rights commission issued a finding of no probable cause regarding plaintiff's March 13, 1981 charge. On December 22, 1982, the Equal Employment Opportunity Commission made its determination that there was no reasonable cause to believe plaintiff's March 13, 1981 charge was true and issued plaintiff a notice of right to sue.

7. Plaintiff timely filed a charge with the Ohio Civil Rights Commission on September 28, 1981 respecting the recall of a white inspection foreman, John Johnston,

on September 14, 1981 before plaintiff was recalled. On January 14, 1982, the Ohio Civil Rights Commission issued a finding of no probable cause regarding plaintiff's September 28, 1981 charge. On December 13, 1982, the Equal Employment Opportunity Commission made its determination that there was no reasonable cause to believe that plaintiff's September 28, 1981 charge was true and issued plaintiff a notice of right to sue.

8. Defendant Chrysler executes a nondiscriminatory policy in the recall of supervisory personnel. The Chrysler supervisory recall policy is based on the individual's classification or ability to do the available work in the area of increased need, as well as the individual's years of corporate service.

9. Wayne Russell, John Johnston and plaintiff were all recalled in accordance

with defendant's nondiscriminatory supervisory recall policy.

10. Unlike plaintiff, Wayne Russell had supervisory experience in several different departments. Wayne Russell also had prior experience as a general foreman that plaintiff lacked. Such general supervisory experience in a number of different departments was required for the production foreman position filled by Wayne Russell on March 9, 1981.

11. John Johnston was permanently classified as an inspection foreman, while plaintiff was permanently classified as a production foreman and had never been classified as an inspection foreman prior to September 14, 1981. The position to which John Johnston was recalled on September 14, 1981 was an inspection foreman position.

12. Defendant's decisions to recall Wayne Russell and John Johnston before plaintiff were based on legitimate, non-discriminiatory business reasons and were not based on plaintiff's race.

13. The reasons established by defendant for recalling Wayne Russell and John Johnston before plaintiff were the true reasons and not merely a pretext for decisions which were based on plaintiff's race.

Conclusions of Law

1. This Court has jurisdiction over the parties and has subject matter jurisdiction pursuant to 42 U.S.C. §2000e-5(f)(3).

2. Plaintiff Federico Erebia was an "employee" within the meaning of 42 U.S.C. §2000e(f) and as a Mexican-American enjoys

the protections afforded by 42 U.S.C. §2000e-2(a)(1).

3. Defendant Chrysler at all times relevant hereto was an "employer" within the meaning of 42 U.S.C. §2000e(b).

4. Plaintiff's claims under Title VII of the Civil Rights Act of 1962, 42 U.S.C. §2000e et seq., are limited solely to the scope of the charges filed with and the investigations conducted by the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission respecting the recalls of Wayne Russell and John Johnston before plaintiff was recalled.

5. In this disparate treatment case under Title VII, plaintiff has the initial burden of establishing a prima facie case of discrimination by proving that: (1) he is a member of a racial minority group; (2)

he was qualified for the available positions to which Wayne Russell and John Johnston were recalled; and (3) Wayne Russell and John Johnston were less qualified for the available positions than plaintiff. If plaintiff establishes a prima facie case, the burden of production then shifts to defendant to articulate some legitimate, nondiscriminatory reason for its actions in recalling Wayne Russell and John Johnston before plaintiff. If defendant does so, plaintiff must then prove that these stated reasons were merely a pretext for decisions based on plaintiff's race. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

6. Plaintiff has failed to establish a prima facie case of disparate treatment regarding either the recall of Wayne Russell or the recall of John Johnston. Plaintiff has not shown that he was

qualified in terms of ability to do the available work or classification for the positions filled by Wayne Russell and John Johnston. Nor has plaintiff shown that Wayne Russell and John Johnston were less qualified for the available positions than plaintiff in terms of their ability to do the available work or classification.

7. Defendant has carried its burden of producing evidence to demonstrate that the recalls of Wayne Russell and John Johnston were made in accordance with Chrysler's nondiscriminatory supervisory recall policy of considering the individual's ability to do the available work or classification as well as corporate service. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

8. Plaintiff has not carried his burden of proving that the legitimate business reasons articulated by defendant

for recalling Wayne Russell and John Johnston before plaintiff were merely a pretext for racial discrimination against plaintiff. Texas Dept. of Community Affairs v. Burdine, supra.

9. Plaintiff is not entitled to relief on his Title VII claims. Accordingly, it is

ORDERED that judgment be, and it hereby is, entered in favor of defendant Chrysler with respect to plaintiff's Title VII claims of discriminatory recall.

/s/ John W. Potter
United States District Judge

Supplemental Judgment in a Civil Case

United States District Court
Northern District of Ohio,
Western Division

Federico Erebia No. C 83-96

v. John W. Potter

Chrysler Plastic Products
Corporation

IT IS ORDERED AND ADJUDGED

that judgment be, and it hereby is, entered in favor of defendant Chrysler with respect to plaintiff's Title VII claims of discriminatory recall.

IT IS FURTHER ORDERED that plaintiff's motion for attorney fee's in the amount of $3,315.00 be, and the same hereby is, granted.

/s/ John W. Potter
UNITED STATES DISTRICT JUDGE

[Filed 1984 APR-4 AM 8:51 CLERK U.S. DISTRICT COURT NORTHERN DISTRICT TOLEDO, OHIO]

Clerk: James S. Gallas Toledo, Ohio
(By) Thomas L. VanWormer 4-4-84

No. 84-3291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERICO EREBIA,

Plaintiff-Appellee,

v. O R D E R

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant-Appellant.

_____/

Before: KENNEDY and MILBURN, Circuit Judges; and PHILLIPS*, Senior Circuit Judge.

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

_____

*Honorable Harry Phillips participated in oral argument but due to his death on August 3, 1985 took no part in the order.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk
Clerk

G. List of Corporate Petitioner's Parent Companies, Subsidiaries and Affiliates Pursuant to Supreme Court Rule 28.1.

The following list is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States. Listed is the parent company and affiliates of the corporate petitioner upon whose behalf the foregoing petition is filed.

Parent Company

Chrysler Corporation

Subsidiaries

None

Affiliates

None

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1049

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Petitioner,

vs.

FEDERICO EREBIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

---

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TABLE OF CONTENTS

Table of Authorities. 2

Brief in Opposition to Petition for a Writ 3

Statement of the Case 4

Facts 5

Merits of Punitive Damages. 6

Conclusion. 10

Certification 11

TABLE OF AUTHORITIES

Cases

Bishop v. Grdina
20 Ohio St.3d 26 (1985). 7, 8

Richard v. Hunter
151 Ohio St. 185 (1949). 8, 9

Seasons Coal Co., Inc.
v. City of Cleveland
10 Ohio St.3d 77 (1984). 8

Statutes

Federal Statutes:

15 Am.Jur. 707 9

No. 85-1049

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Petitioner,

vs.

FEDERICO EREBIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

---

This Court should decline the invitation for a writ of certiorari. The facts of this case have been passed upon by a jury, the trial judge, and the Court of Appeals, all of whom have decided that Chrysler, at its Sandusky, Ohio, plant, created a racially hostile environment.

STATEMENT OF THE CASE

In the present case, Erebia complained to Chrysler on virtually a daily basis, for years, as to the racially hostile environment. Rather than alleviating this environment, the supervisors of Erebia threatened to cause economic harm to Erebia.

Chrysler was unwilling to devote any effort to alleviating this hostile and abusive environment, in contrast to the incredible effort of manipulating the legal system in order to obtain redress, having lost, upon the facts, at all lower levels.

Ohio law clearly permits the award of ten thousand dollars ($10,000.00) for compensatory damages and thirty thousand dollars ($30,000.00) for punitive damages, with interest thereon at the rate of ten and ten-hundredths (10.10%) percent.

FACTS

The jury explicitly found a hostile work environment and specifically found that the employer refused to address the hostile work environment. (Opinion Below, Appendix 25a) The court below specifically found that this determination was supported by substantial evidence and, indeed, that the testimony was uncontroverted that Erebia was subjected to racial slurs from February of 1977 to July of 1982. The court below specifically found ". . . clearly substantial evidence on both the elements of repeated slurs and management's tolerance and condonation of the situation." (Appendix 29a)

The trial court had charged the jury that before they could find for the plaintiff they had to find not only intentional and purposeful discrimination but

also a failure or refusal to instruct subordinate co-workers ". . . intentionally based on plaintiff's race." (Appendix 30a) The court below specifically found: "Management was aware of plaintiff's many complaints of harassment and condoned the situation by taking no steps to improve conditions and by seeking to intimidate plaintiff." (Appendix 38a)

MERITS OF PUNITIVE DAMAGES

The court below remanded this case back to the trial court with directions to award nominal compensatory damages. The court did not determine that Erebia suffered no damages. The court merely found that the proof as to the actual damages sustained was ". . . insufficient to support the verdict . . . ." (Appendix 43a; emphasis added.) The court specifically found that the trial court

had correctly charged on the issue of punitive damages--to require a finding that Chrysler's conduct was wanton or oppressive--and the court below found: "The jury's award for punitive damages was supported by substantial evidence." (Appendix 44a) The Court of Appeals specifically found ". . . Lenz's [a member of Chrysler management] threat that he would hurt plaintiff economically for pursuing his complaints of harassment" was a sufficient fact upon which to establish malice. (Appendix 45a) The decision of the Court of Appeals in upholding the award of punitive damages, together with nominal damages, is consistent with Ohio law. Bishop v. Grdina, 20 Ohio St.3d 26 (1985), rejected any consideration of punitive damages where ". . . the jury found no actual damages . . ." and there was ". . . no proof of actual

damages . . . ." (Emphasis original.) Seasons Coal Co., Inc. v. City of Cleveland, 10 Ohio St.3d 77 (1984), rested upon the fact that there was no "credible claim for compensatory damages" and that there was no proof "of any actual damages". Richard v. Hunter, 151 Ohio St. 185 (1949), the underpinings for both Bishop and Seasons Coal, supports the Court of Appeals' decision in this case. Headnote one of Richard requires "proof of actual damages" only. In headnote two, in order to reject punitive damages, the court held: ". . . a verdict returned by the jury, expressly denying the recovery of compensatory damages, is an affirmative finding that no actual damages were established." This is in direct contrast to Erebia, wherein actual damages were proven; and, while the court sustained an award of

actual damages, it directed the reduction of the amount to a nominal amount. Richard v. Hunter requires proof of actual damages only, not both proof and an award of actual damages greater than nominal in amount. The court adopted the following language: "According to the weight of authority, punitive damages may be recovered although the actual damages found are only nominal in amount." (The Supreme Court in Richard quoted rather at random from 15 Am.Jur. 707, pointing out the appropriateness of punitive damages in Erebia-like situations where actual damages were sustained but were reduced to a nominal amount because of the difficulty of measurement.) In Richard v. Hunter, a jury returned an award of zero damages. In that case, no actual damages were sustained. In the present case, actual damages were sustained and were so

determined by the jury, the trial judge, and the reviewing court. The law in Ohio is, therefore, clear--the decision of the Court of Appeals is correct.

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CERTIFICATION

This is to certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were served upon petitioner in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 17th day of January, 1986, addressed as follows:

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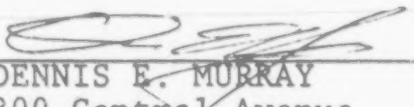

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